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No. 421

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

HENRY KENNETH WANGROW and
MARK EDWARD MURPHY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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AUTHORITIES CITED

	PAGE
Cases:	
Barfield v. U. S., 229 Fed. 2d 936	4, 6, 8
U. S. v. Bollenbach, 326 U.S. 607	7
Griffin v. California, 380 U.S. 609	7
State ex rel. Riendeau v. Tahash, 276 Minnesota 26, 148 N.W. 2d 557	7
Bruce v. U. S., 73 Fed. 2d 972 (CA 8, 1934)	8
Niederluecke v. U. S., 47 Fed. 2d 888 (CA 8)	8
Beufve v. U. S., 374 Fed. 2d 123 (CA 5, 1967)	8
Heflin v. U. S., 358 U.S. 415	8, 9
Milanovich v. U. S., 365 U.S. 551	8, 9
Wong Sun v. U. S., 371 U.S. 471	11
Statutes:	
18 U.S.C. 641	1, 2, 8
18 U.S.C. 2115	2, 8, 9
18 U.S.C. 1361	2
18 U.S.C. 371	2, 8
18 U.S.C. 2312	2
18 U.S.C. 1254 (1)	3
Court Rule:	
Rule 51 (b), Federal Rules of Criminal Procedure	9

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Your Petitioners respectfully show to the Court as follows:

I

Petitioners refer the Court to the opinion of the United States Court of Appeals for the Eighth Circuit dated July 22, 1968, wherein that Court affirmed the judgment of conviction of Petitioners in the United States District Court for the District of Minnesota upon the following charges:

A. An information charging Petitioners with a violation of *18 U.S.C. 641* (retaining currency, coin, and postage stamps in excess of the value of $100 on October 8, 1966, in Bloomington, Minnesota, a suburb of St. Paul, Minnesota);

B. One count of an indictment charging Petitioners with forcibly breaking and entering a post office on Oc-

tober 8, 1966, at St. Paul, Minnesota, in violation of *18 U.S.C. 2115*;

C. One count of an indictment charging Petitioners with destruction of government property (a safe in the post office building referred to above) of the value in excess of $100 in violation of *18 U.S.C. 1361*, on October 8, 1966;

D. Conspiring to break into a United States Post Office—the same one referred to above—in violation of *18 U.S.C. 371*;

E. Transporting a stolen motor vehicle in interstate commerce on October 6, 1966, from Chicago, Illinois, to Bloomington, Minnesota—which act constituted an alleged overt act in the conspiracy count referred to in paragraph D above—in violation of *18 U.S.C. 2312*.

In short, one alleged episode gave rise to Petitioners' conviction and sentencing upon five separate charges.

Petitioners each received the following sentences:

1) Upon the information charge of retaining money and stamps from the same post office alluded to in the other indictment charges (18 U.S.C. 641), 10 years:

2) Upon the Dyer Act violation, which conduct was used as an overt act in the conspiracy charge, five years consecutive to the retaining charge (18 U.S.C. 641);

3) Upon the destruction of government property charge (18 U.S.C. 1361), 10 years concurrent with the information charge of retaining;

4) Upon the forcible entry and breaking charge (18 U.S.C. 2115), five years concurrent with the Dyer Act charge;

5) Upon the conspiracy charge (18 U.S.C. 371), five years concurrent with the Dyer Act charge.

A copy of the opinion is hereto appended.

II

Jurisdiction herein is invoked pursuant to the provisions of *Title 18 U.S.C. 1254 (1).*

III

The judgment of the United States Court of Appeals for the Eighth Circuit herein is dated July 22, 1968.

IV

Questions for review are:

A. Is there a conflict in the circuits in Dyer Act cases as to the legal and evidentiary effect of claimed possession of recently stolen property?

B. Were the instructions with respect to claimed possession of "recently stolen property" such that the burden of proof was shifted to the Petitioners so that they were required to assume the burden of proving their innocence of the Dyer Act accusation?

C. Was the evidence sufficient to prove beyond a reasonable doubt Petitioners' guilt of the Dyer Act accusation?

D. Is the Government permitted to pyramid charges so that one may be convicted for both 1) forcibly entering a post office to steal stamps and 2) retaining the stamps?

E. Was there probable cause for the arrest of Petitioners at the Thunderbird Motel, Bloomington, Minnesota, on October 8, 1966?

F. Was the search of and seizure from the car with which Petitioners were allegedly connected legal?

V

There appears to be a conflict in the circuits as to the legal and evidentiary effect of claimed possession of recently stolen property in Dyer Act cases.

Thus, in the Fifth Circuit, in *Barfield v. U. S., 229 Fed. 2d 936*, the following instruction was held to constitute reversible error in a Dyer Act case:

> "Our Court has said this proof that Defendant * * * was in possession of property recently stolen raises a presumption of guilty knowledge which in the absence of explanation may warrant a conviction by the jury.
>
> "Now Gentlemen, I am not saying that the burden of proof shifts to the Defendant to prove that he did not know it. It never shifts to the Defendant. The burden is always on the United States to prove beyond a reasonable doubt that he did know that it was stolen. But you have a right to look at the explanation which the Defendant gave in this case. If you are not satisfied with that explanation, if you do not believe it, and if you believe that the only explanation that has been offered worthy of belief is that the car did cross the line, it had been stolen and that he was in possession of it, and you do not believe what the Defendant said about it, you would have a right to presume that he knew it had been stolen, and that is what the law means and that is what the law says."

After objection had been taken to the foregoing instruction, the Court instructed the jury:

> "That is withdrawn from the jury. The Court charges the jury that proof that a Defendant who was in possession of property recently stolen raises a presumption of guilty knowledge which in the absence of explanation may warrant conviction."

Petitioners respectfully submit that if the foregoing instruction was held to constitute reversible error, then the instruction upon that issue in the instant case also should be reversible error, contrary to the holding of the Court in the Eighth Circuit in the instant case.

In the instant case the instruction was (Tr. pp. 396-398):

"Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"With respect to Counts III and IV, involving the automobiles, possession in one State of property recently stolen in another State, *if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it or caused it to be transported in interstate commerce.*"

"With respect to the charge in the Information involving the postage stamps and money, possession of property recently stolen, *if not satisfactorily explained,* is also *ordinarily a circumstance from which the jury may reasonably draw the inference and find,* in the light of surrounding circumstances shown by the evidence in the case, *that the person in possession not only knew it to be stolen property, but also participated in some way in the theft of the property.*

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from *unexplained possession.*

"With respect to Counts III and IV, if you should find beyond a reasonable doubt from the evidence in the case that the automobile described in Counts III and IV in the indictment was stolen, and was transported in interstate commerce as charged, and that, while recently stolen, the property was in the possession of the accused in another State than that in which it was stolen, *the jury would ordinarily be justified in drawing from those facts the inference that the automobile was transported, or caused to be transported in interstate commerce by the accused, with the knowledge that it was stolen, unless possession of the recently stolen property by the accused in such other State is explained to the satisfaction of the jury by other facts and circumstances in the case.*" (Emphasis supplied.)

At trial, counsel for Petitioners took exception to the instructions as to Counts III and IV as shifting the burden of proof to the Petitioners (Tr. pp. 408-409).

Petitioners respectfully submit that the instruction in the instant case quoted above is the same in effect and to the ears and understanding of a jury as the erroneous instruction in *Barfield, supra.* Thus, to lay persons, the meaning of "presumptions" which may arise from the fact of possession of recently stolen property is no different from saying that "possession of recently stolen property, *if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find * * * that the person in possession not only knew it to be stolen property, but also transported it or caused it to be transported in interstate commerce.*" Indeed, it may be validly contended that the language in the instant case in that regard, by reason of its having been stated at least twice, is stronger language than that in *Barfield, supra.*

The effect of the instruction, with its repeated reference to *unexplained possession* is that a jury would be led to believe that it was incumbent upon Petitioners to make an explanation of possession and that if they did not testify, then the law required their being found guilty. That, of course, is not the law, but in the instant case the jury could have been led only to that conclusion.

The holding and rationale of *U. S. v. Bollenbach, 326 U.S. 607*, seems applicable here. In that case in a prosecution for conspiracy to commit an offense under the National Stolen Property Act, an instruction that the possession of property shortly after it had been stolen in another state created a presumption that the possessor had transported the property in interestate commerce was held to be reversible error.

To a similar effect is *Griffin v. California, 380 U.S. 609*, and *State ex rel. Riendeau v. Tahash, 276 Minnesota 26, 148 N.W. 2d 557.*

VI

Petitioners urge that the evidence was insufficient to prove their guilt of the Dyer Act violation beyond a reasonable doubt because the only evidence in that connection was their connection with the automobile 51 days after its claimed theft.

Thus the car was claimed to have been stolen on August 15, 1966, in Illinois; Petitioners' only connection with the automobile in Illinois was shown to have occurred on October 5, 1966. Petitioners contend that that fact cannot be a basis for a finding that they were in possession of property "recently stolen".

The cases cited by the Eighth Circuit in its opinion in the instant case as establishing the sufficiency of the evidence are clearly distinguishable in that in those cases the claimed possession of the accused was much closer in time to the thefts.

Thus, the period between the theft and the defendants' possession in the cases cited by the Eighth Circuit Court in the instant case was as follows:

In *Bruce v. U. S., 73 Fed. 2d 972 (CA 8, 1934)*, possession was shown four days after the theft; in *Niederluecke v. U. S., 47 Fed. 2d 888 (CA 8)*, possession was shown 19 days after the theft; in *Reufve v. U. S., 374 Fed. 2d 123 (CA 5, 1967)*, possession was shown six days after the theft; in *Barfield v. U. S., 229 Fed. 2d 936 (CA 5, 1956)*, possession was shown five days after the theft.

VII

In charging Petitioners with both breaking and entering a Post Office in violation of *18 U.S.C. 2115* (Count I, Indictment) and conspiring to do so in violation of 18 U.S.C. 371 (Count V, Indictment) and in addition charging them by information with "retaining" the fruits of the claimed Post Office breaking and entering, in violation of *18 U.S.C. 641*, the Government was permitted to "pyramid penalties" and cause them to face and be sentenced for charges of being at once stealers and possessors. This is contrary, Petitioners respectfully submit, to the holdings and rationale of *Heflin v. U. S., 358 U.S. 415*, and *Milanovich v. U. S., 365 U.S. 551*.

Petitioners were charged by information with a violation of *18 U.S.C. 641*, which in pertinent part provides:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another * * * money or thing of value of the United States or of any department or agency thereof * * * or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his own use or gain, knowing it to have been embezzled, stolen * * *" shall be guilty of an offense.

The subject matter of the information was the claimed fruit of the breaking and entering into a Post Office by Petitioners, in violation of *18 U.S.C. 2115* which provides:

> "Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office * * * any larceny or other depradation * * *" shall be guilty of an offense.

In effect, then, Petitioners were charged and sentenced for being at once stealers and possessors or receivers. The situation is virtually identical with that presented in cases where one is charged with both robbing a bank and with being a receiver of the fruits thereof. In the latter case, this Court has held that one cannot be guilty of both bank robbery and receiving. *Heflin v. U. S., supra; Milanovich v. U. S., supra.*

In pre-trial motions for misjoinder and prejudicial joinder this error was subsumed, and in any event would constitute plain error within the meaning of *Rule 51 (b), Federal Rules of Criminal Procedure.*

VIII

Petitioners' convictions were accomplished as the result of 1) their arrest in a room in the Thunderbird Motel, Bloomington, Minnesota, in the nighttime of October 8, 1966, without a warrant, and a search of the premises purportedly incidental to that arrest and 2) a search warrant issued the following day for the search of two automobiles from which crucial evidence was obtained.

Petitioners submit that whether probable cause existed for their arrest depended upon the testimony of Fred D. Holmes, a Minneapolis police detective, who had been instructed by his

superiors to conduct a surveillance of four persons and the two automobiles involved.

Petitioners submit that their arrest resulted from claimed observations of Holmes whose testimony both at trial (Tr. pp. 99-116) and at a hearing on a motion to suppress showed that he did not and could not identify Petitioners as engaging in suspicious conduct—he did not identify Petitioners as persons in possession of burglarious tools. Yet, on the basis of what he reported to his associates, officers of the Minneapolis Police Department and United States Postal Inspectors entered a room where Petitioners were present and purported to arrest Petitioners for possession of burglarious tools. What he reported is set out in a transcript of proceedings had in Hennepin County District Court, Minneapolis, Minnesota, on Petitioners' motions to suppress evidence obtained at the time of their arrest and upon search warrants obtained a day later for a search of the automobiles involved. That transcript was included as a part of the record in the instant case. Holmes' testimony is set out at pages 267 through 269 of that transcript. Nowhere in his testimony did he identify Petitioners as being engaged in suspicious conduct or in the possession of burglarious tools for which they were arrested. Holmes referred only to four men whose conduct consisted in the movement of items from one car to another, but he did not make an eyewitness identification of either of Petitioners as being one of the four men whose conduct he observed. This matter was, we respectfully submit, elided by the lower courts in their determination of probable cause for Petitioners' arrest and the searches conducted in connection therewith.

Of course, if there was no probable cause for Petitioners' arrest because of the failure of Holmes to identify them, then the subsequent search of the automobiles involved which was

based upon search warrants the probable cause for which was the result of Petitioners' illegal arrest was illegal. *Wong Sun v. U. S., 371 U.S. 471.*

IX

For the reasons set forth in paragraphs V, VI, VII, and VIII above, we respectfully submit that this Court should grant a Writ of Certiorari directed to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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